Internal Revenue Service

# memorandum

WHEARD
CC:TL:TS

date: JUL 18 1990

to: District Counsel, Miami CC:MIA
Attn: William Spatz

from: Assistant Chief Counsel (Tax Litigation)

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subject: [redacted]
TL-N-5999-90
CC:TL:TS Heard Wilson
T.C. Rules 250 & 248, I.R.C. §§ 6231(a)(7), 6226(d)(2) and 6224(c)(2); Determination of TMP, Consistent Settlement, Decision Documents

This memorandum is in response to your request for tax litigation advice received by this office on April 19, 1990.

## ISSUES

1. Is a Rule 250 motion to appoint a tax matters partner (TMP) required where the petition correctly identifies the TMP under the largest profits interest rule and there has been no designation of any other partner as TMP?

2. What form should a Rule 248 stipulated decision document take when the decision will only be binding on a nonparticipating partner?

3. How should Appeals "settle" with partners whose statutes have expired and will the one remaining party have a right to consistent settlement under I.R.C. § 6224(c)(2)?

## CONCLUSIONS

1. Since we agree that the petitioner correctly identified the largest profits interest general partner as tax matters partner in his petition (assuming that petitioner stipulates that there was no designation), there is no dispute as to who the TMP is. Thus, a Rule 250 Motion to determine the TMP is not appropriate. An amended answer should be filed admitting that the TMP was correctly identified in the petition.

2. Since the sole nonparticipating party has intervened, this issue is moot.

3. The decision in this case should reflect that the statute of limitations has expired with respect to all partners except for one. No settlement documents should be executed with respect to partners whose statutes have expired since the decision document will govern them in this respect and also because the execution of a settlement agreement could arguably invoke the right of the one remaining party to a consistent settlement.

## FACTS

A general partner, representing himself to be the tax matters partner (TMP), executed a statute extension on behalf of all partners in the partnership. This partner was not in fact the TMP, since there had been no designation of TMP by the other partners, and he was not the general partner holding the largest profits interest at the end of the year in question. Thus, the extension was invalid with respect to all partners other than the partner signing the extension. A notice partner filed a petition with respect to a notice of final partnership administrative adjustment issued to the partners in the above case. Respondent conceded in its answer that the period for assessment had expired with respect to all partners in the partnership except for the partner who purported to extend the period on behalf of all partners.

The petition identified the general partner with the largest profits interest at the end of the taxable year in question as the TMP. Respondent denied for lack of knowledge that this partner was the TMP.

The partner who executed the statute extension as TMP has filed a notice of election to participate since your request for tax litigation advice was received by this office.

## DISCUSSION

### Rule 250 Motion

This office previously advised your office that the partner who executed the consent to extend the period for assessment lacked authority to extend the period for other partners because he was not the TMP. We nevertheless concluded that the extension was valid with respect to that partner. This conclusion was based on the fact he was authorized to extend the period for assessment on his own behalf. I.R.C. § 6226(b)(1)(A).

Initially we note that a motion to determine or appoint a TMP is governed by Rule 250. Rule 250(b) governs removal of a TMP. Rule 250(a) governs determination or appointment of a TMP when the identity of a TMP is uncertain. Rule 250(a) provides:

> (a) **Appointment of Tax Matters Partner:** If, at the time of commencement of a partnership action by a partner other than the tax matters partner, the tax matters partner is not identified in the petition, then the Court will take such action as may be necessary to establish the identity of the tax matters partner or to effect the appointment of a tax matters partner.

There is no record of a designation of TMP by the partnership. In the absence of a designation of a TMP by the partnership, the general partner with the largest profits interest at the close of the taxable year involved is the TMP. I.R.C. § 6231(a)(7) and Temp. Treas. Reg. § 301.6231(a)(7)-1T(m). In the present case it appears that the petitioner correctly identified in the petition the general partner with the largest profits interest at the end of the year in question as the TMP.

Thus, we recommend that you do not file a rule 250 motion in the instant case. Instead, we recommend that you seek to amend your answer to admit that the largest profits interest general partner is the TMP as alleged in the petition.

Rule 248 Decision

Section 6226(c) and (d) govern which partners are considered to be parties to an action and thus will be bound by a decision. These provisions provide as follows:

> (c) **Partners treated as Parties.**-If an action is brought under subsection (a) or (b) with respect to a partnership for any partnership taxable year-
>
> > (1) each person who was a partner in such partnership at any time during such year shall be treated as a party to such action, and
> >
> > (2) the court having jurisdiction of such action shall allow each such person to participate in the action.
>
> (d) **Partner Must have Interest in Outcome.**-
>
> > (1) **In order to be a party to action.**- Subsection (c) shall not apply to a partner after the day on which -

> (A) the partnership items of such partner for the partnership taxable year became nonpartnership items by reason of 1 or more of the events described in subsection (b) of section 6231, or
>
> (B) the period within which any tax attributable to such partnership items may be assessed against that partner has expired.
>
> (2) **To file a petition.**-No partner may file a readjustment petition under subsection (b), unless such partner would (after the application of paragraph (1) of this subsection) be treated as a party to the proceeding.

Thus, all partners whose items have not converted and whose period for assessment has not expired under section 6229(a) will be bound by a decision in a TEFRA proceeding whether or not they petition or move to participate or intervene.

Rule 248 of the Tax Court Rules of Practice and Procedure was specifically designed to provide for the situation where only nonparticipating partners will be bound by a proposed form of decision. For instance, when all participating parties settle their cases, their partnership items will be converted to nonpartnership items pursuant to section 6231(b)(1)(C), they will no longer be parties under section 6226(c) and (d), and thus, they are not bound by the decision. Assessments of these partners are made under the settlement agreement rather than under the decision. See I.R.C. § 6230(a)(2)(A)(ii). Only nonparticipating parties would be bound by the decision in such a case.

Thus, where the only party is not participating, a proposed form of decision can be submitted in the normal manner. A paragraph should be added to the proposed form of decision noting that the period for assessment has expired with respect to all partners except one. Thus, only this partner will be bound by the decision. The nonparticipating party would be informed of the proposed decision under the procedures outlined under Rule 248 and would have sixty days to seek to participate out of time under this rule and continue litigating this case.

In summary, there is no reason to deviate from the normal procedure under Rule 248 when only nonparticipating parties will be bound by the decision. Some additional language will be necessary in the decision, however, noting against whom the decision is binding.

We understand that the above discussion is now moot since the single remaining party has already moved to participate and presumably will take over the litigation of the case.

Consistent Settlement

Your incoming memorandum also raises a question about whether we must "settle" with the initially nonparticipating partner on the same basis as the original petitioners. Initially we note that section 6224(c)(2) provides:

> (2) **Other partners have right to enter into consistent agreements.**-If the Secretary enters into a settlement agreement with any partner with respect to partnership items for any partnership taxable year, the Secretary shall offer to any other partner who so requests settlement terms for the partnership taxable year which are consistent with those contained in such settlement agreement.

Thus, a partner may request consistent settlement terms only if a partner and the Service enter into a settlement agreement with respect to partnership items. It is our understanding that the Service has not entered into a settlement agreement with the petitioners. Since the Service has conceded the statute of limitations issue on answer, no settlement agreement is necessary or appropriate. Since the right to consistent settlement terms is predicated on "enter[ing] into a settlement agreement" and no settlement agreement has been entered into, the intervening partner has no right under the Code to request consistent treatment.

Furthermore, even assuming arguendo that the intervenor could request consistent settlement terms based on respondent's concession in the answer, consistent settlement terms are those based on the same determinations with respect to partnership items. Temp. Treas. Reg. § 301.6224(c)-3T. The relevant "determination" in this case is that only the intervenor was bound by the statute extension. Consistent treatment based on this determination results in allowance of the relevant deductions to the petitioners and disallowance of the same deductions to the intervenor. Thus, the Service is not required to concede the adjustments with respect to the intervenor.[1]

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[1] Note that section 6229(b)(1)(A) allows the partnership statute to be extended separately with respect to each partner.

In summary, since we agree with the petitioner's identification of the tax matters partner, a stipulation to this effect should be filed and a Rule 250 motion to determine the TMP should not be filed. The Service should not execute settlement agreements with partners based on an expired statute since these partners will be governed by this determination in the final decision. Furthermore, the sole party left in the proceeding does not have a right to consistent settlement. Finally, it is generally appropriate to file Rule 248 decision documents whether or not any participating partners are left in the proceeding.

Please refer any questions on this matter to Bill Heard at FTS 566-3289.

MARLENE GROSS

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